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No. 82-808

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NATHAN MAURICE SHAY,
Petitioner

VS.

THE STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS FIFTH SUPREME JUDICIAL DISTRICT

Kerry P. FitzGerald
Attorney at Law
3503 Fairmount
Dallas, TX 75219
214/526-6817

COUNSEL FOR PETITIONER

QUESTION PRESENTED

The judgments of conviction of forgery should be set aside and new trials granted as no rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.

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Jackson v. Virginia, 443 U.S. 307 11

Phleging v. State, 572 S.W.2d 517 11

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas is attached hereto as Exhibit A.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Fifth Supreme Judicial District was entered on May 4, 1982. Petitioner's Motions For Rehearing in the Court of Appeals were overruled on June 17, 1982. The Court of Criminal Appeals refused Petitioner's Petitions for Discretionary Review on September 15, 1982. See Exhibit B. The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

The Petitioner was charged in two separate indictments with passing a forged instrument, that is, with intent to defraud and harm another, the Petitioner passed to the Complainant a forged writing knowing same to be forged.

On October 21, 1979, the Complainant's girlfriend, while doing her laundry at a public washateria, began chatting with Petitioner casually and eventually talked about traveling. She indicated that she and the Complainant intended to take a trip to New York over the Thanksgiving holidays. Petitioner said he had some discount airline tickets and would be happy to sell some to her. She called the Complainant who came to the washateria and agreed to buy two of the coupons at $25.00 per coupon. When Petitioner declined to accept a check, the Complainant's girlfriend went to a grocery store, cashed a check, and returned and gave the

Petitioner $50.00 in cash. Petitioner identified himself as Neil Simon. When the Complainant asked for his phone number in the event he wanted additional coupons for his friends, Petitioner declined to give same as it was unlisted. The following day the Complainant determined the coupons were counterfeit. Subsequently, the Complainant and his girlfriend saw the Petitioner or the Petitioner's wife and child at the same washateria. On one such occasion they followed him to his apartment complex where they determined where he lived. Later they determined where he worked. They also had Petitioner's license number from his vehicle.

The Complainant saw the Petitioner at a barbecue place near the washateria some time later but did not mention the counterfeit coupons.

Likewise, the Complainant's girlfriend had occasion to see Petitioner's wife and child at the laundromat some time after the

purchase of the coupons. At this time, Petitioner's wife said "If you will let me know where you live or your address or your telephone number, I will see that you get the money back" (RII-60,65). She, however, refused to give her name or address (RII-60, 65).

The question presented for review, that the evidence is insufficient to support the judgments of conviction, was presented at the first stage of this appeal.

REASONS FOR GRANTING THE WRIT

Petitioner submits that the State has failed to demonstrate guilty knowledge on the part of Petitioner that the coupons were forged or that Petitioner had intent to defraud.

Section 32.21 of the Texas Penal Code provides:

> "(b) A person commits an offense if he forges a writing with intent to defraud or harm another."

The State's case basically shows that the Complainant's girlfriend and Petitioner talked casually about travel plans, that Petitioner offered to sell her several American Airlines coupons and did so for $50.00 in cash. The State relied primarily upon Petitioner's insistence upon cash, his refusal to give the Complainant his telephone number, and the Petitioner's identifying himself with a fictitious name, to support the judgment of conviction.

Petitioner submits that while the giving of a fictitious name is suspicious, the other circumstances are as consistent with innocent activity as with guilty activity. By requesting cash as opposed to a check, Petitioner did not run the risk that he would be paid with a hot check and he was assured of payment. The Petitioner had an unlisted phone number and this is certainly not uncommon; further, it is common knowledge that an individual seeks an unlisted number in

order to severely restrict public knowledge as to said telephone number. The State's case then hinges upon the giving of a fictitious name.

However, it should be also emphasized that Petitioner and his wife and child continued to use the same laundromat after this transaction and made no secret of their comings and goings. Further, when the Complainant's girlfriend braced the Petitioner's wife concerning the transaction, Petitioner's wife immediately advised that she would get her money back if she would only give her name and address, but the Complainant's girlfriend in turn refused. This latter incident obviously reflects an intent to reimburse for any loss suffered and further corroborates that Petitioner did not have the intent to cheat or defraud any person. It is uncontroverted that Petitioner and his family lived nearby the laundromat and that he officed within several doors

of the laundromat and was in no way trying to hide or absent himself from the scene where the transaction took place.

There is no evidence in the record that Appellant ever made an incriminating statement or that he ever tried to flee the scene.

Petitioner submits that after reviewing the evidence in the light most favorable to the Prosecution, no rational trier of fact could have found the essential elements of this crime as charged in each indictment beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Phleging v. State, 572 S.W.2d 517 (Tex. Crim. App. 1978).

WHEREFORE, PREMISES CONSIDERED, the Petitioner respectfully prays that a Writ of Certiorari should issue to review the opinion of the Texas Court of Criminal Appeals and that subsequent thereto, that the judgments of conviction will be reversed and

judgments of acquittal entered herein.

Respectfully submitted,

KERRY B. FITZGERALD
Attorney at Law
3503 Fairmount
Dallas, TX 75219
214/526-6817
State Bar Card 07088000

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition were mailed with first-class postage prepaid to Mr. Henry Wade, Criminal District Attorney, Dallas County Courthouse, Dallas, Texas, on the 9th day of November, 1982.

KERRY P. FITZGERALD

No.

IN THE

SUPREME COURT OF THE UNITED STATES

NATHAN MAURICE SHAY,
Petitioner

VS.

THE STATE OF TEXAS,
Respondent

STATEMENT OF COUNSEL

COUNTY OF DALLAS)

STATE OF TEXAS)

My name is Kerry P. FitzGerald and I am Counsel of Record for Nathan Maurice Shay. I deposited in a United States Post Office in Dallas Texas, with first-class postage prepaid, addressed to the Clerk of the United States Supreme Court, 40 copies of the Petition For Writ of Certiorari on the 9th day of November, 1982, which was within the time permitted to file said Petition.

KERRY P. FITZGERALD

SUBSCRIBED AND SWORN TO before me by Kerry P. FitzGerald on this the 9th day of November, 1982.

Notary Public in and for the State of Texas, County of Dallas

My commission expires on: January 25, 1986

EXHIBIT A

COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 05-81-00465-CR
No. 05-81-00466-CR

NATHAN MAURICE SHAY,
Appellant

VS.

THE STATE OF TEXAS,
Appellee

May 4, 1982

From a District Court of Dallas County, Texas.

Before CHIEF JUSTICE GUITTARD and JUSTICES FISH and VANCE, Opinion Per Curiam.

Offense: Passing forged instrument (two offenses arising from the sale of two airline coupons). Trial: By a jury. Sentence: Four years. All of Appellant's grounds of error are overruled for the reasons stated.

First Ground: Failure to Prove all Elements of the Offense.

In his first ground of error, appellant contends the State failed to prove the necessary elements of the offense. He argues that the evidence is insufficient to show

that he had knowledge the coupons which he sold were forged or that he intended to defraud the complaining witness, George Kent.

Considering the evidence in the light most favorable to the State, we are unable to agree with appellant's contention. The State may establish intent to defraud or harm circumstantially by proof of the accused's knowledge that the instrument was forged. Hill v. State, 608 S.W.2d 932,934 (Tex. Crim. App. 1980); Wilson v. State, 605 S.W.2d 284,286 (Tex. Crim. App. 1980). George Kent testified that at the time of the transaction, appellant insisted on cash, refused to give Kent his telephone number, which was unlisted, and gave Kent a false name. We find these circumstances sufficient, taken as a whole, for the jury to find that appellant knew that the coupons in question were forged and, therefore, acted with intent to defraud. See Castanuela v. State, 435 S.W.2d 146, 147-148 (Tex. Crim. App. 1968).

Second Ground: Identification of Coupons

Appellant next contends the trial court erred in admitting the coupons in evidence since the complaining witness failed to positively identify the two coupons as those sold to him. Although the complaining witnexx was unable to positively identify the coupons admitted at trial, a positive identification was made by subsequent witnesses who testified on behalf of the State. James Craft, an employee of American Airlines, testified that after Kent tendered the coupons to a ticket agent, the coupons were placed in a sealed envelope and taken to Jesse Orr, a security representative for the airline. Orr testified that before receiving the coupons in question, Craft read to him over the telephone the serial numbers of the coupons received from Kent. Orr stated that he made a written memorandum of the numbers read to him and that upon receiving the coupons from Craft he matched the serial numbers on the coupons with the

numbers contained in his written memorandum. Orr testified that he then turned the coupons over to the police. At trial Orr identified the coupons admitted in evidence as the coupons handed to him by Craft. We hold the testimony of these two witnesses sufficient to identify the coupons admitted at trial.

Third Ground: Additional Witnesses

In his third ground of error, appellant contends the trial court erred in overruling his motion for mistrial. Appellant argues that his motion should have been granted because the state was permitted to call three additional witnesses whose names did not appear on the list of witnesses provided by the State prior to trial.

The record shows that in response to a motion filed by appellant, the State furnished appellant a list of witnesses who would be called to testify at trial. The names of Faye Jackson, James Craft, and Jesse Orr were not included on the list. At trial the prosecutor requested that these

three witnesses be permitted to testify to prove the identity of the forged coupons. The prosecutor stated that he had not intended to call these witnesses to testify, but that their testimony was required because the other witnesses had failed to identify the coupons. Appellant pleaded surprise and asked for a mistrial, but did not move for a continuance or for a postponement under Article 29.13 of the Code of Criminal Procedure so that he could interview the additional witnesses. Neither did he show bad faith on the part of the State in failing to disclose their names. In light of these facts, we conclude that the trial court did not abuse its discretion in denying the mistrial. Lincoln v. State, 508 S.W.2d 635, 637 (Tex. Crim. App. 1974).

Fourth Ground: Motion for New Trial

Appellant contends the trial court erred in sentencing appellant without considering his motion for new trial or his amended motion for new trial, which, he asserts, had

not been overruled by the court or by operation of law. The following facts are established in the record.

Judgment was entered on October 2, 1980; the trial court sentenced appellant on the same date. In so doing, the trial court, under the law then in effect, denied appellant the ten-day statutory period for filing a motion for new trial. TEX. CODE CRIM. PRO. ANN. Art. 40.05 (Vernon 1979). Nevertheless, appellant filed a motion for new trial on October 6, 1980. Subsequently, the court realized that this procedure was improper because the sentence had been pronounced before the motion was filed. Accordingly, on May 19, 1981, appellant filed a motion to withdraw his appeal, which the trial court granted. On the same date the court entered an order setting aside the sentence entered on October 2, 1980. The court re-sentenced appellant on June 1, 1981.

Because appellant was convicted and sentenced on the same day without having

waived the statutory ten-day period in which to file a motion for new trial, the sentence was improper and the notice of appeal was premature. Woods v. State, 532 S.W.2d 608 (Tex. Crim. App. 1976). This being so, appellant's motion for new trial was timely filed and properly before the court. See Reed v. State, 516 S.W.2d 680 (Tex. Crim. App. 1974). If not ruled on by the court, it was overruled by operation of law on October 26, twenty days after it was filed. TEX. CODE CRIM. PRO. ANN. Art. 40.05 (Vernon 1979); St. Jules v. State, 438 S.W.2d 568, 570 (Tex. Crim. App. 1969). Thus appellant was not denied his right to file a motion for new trial. The trial court, however, realizing that the first sentence was improper, set it aside and waited twelve days before pronouncing sentence again. Thus defendant had another opportunity to present or file a motion for new trial. Woods v. State, supra. This he did not do. The second sentence, therefore, was proper and the

appeal was duly perfected. Under these circumstances we conclude that appellant was not prejudiced by any error in the first sentence.

Affirmed.

PER CURIAM

D.N.P.
Rule 207

EXHIBIT B

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas SEP 15 1982

I have been instructed to advise that the Court has this day refused the APPELLANT'S petition for discretionary review in Cause No. 609-82, NATHAN MAURICE SHAY, 610-82, NATHAN MAURICE SHAY.

Sincerely yours,

THOMAS LOWE, Clerk

EXHIBIT C

Court of Appeals
Fifth Supreme Judicial District of Texas
Dallas County Courthouse
Dallas, Texas 75202

Date: June 17, 1982

Honorable Kerry P. FitzGerald
Attorney at Law,
3503 Fairmount
Dallas, TX 75219

Counsel:

You are nereby notified that, in the case of:

NATHAN MAURICE SHAY, Appellant vs. The State of Texas, Appellee, our NO. 05-81-00465-CR the following decision and order was this date made and entered by the Court:

Motion for Rehearing, OVERRULED: June 17, 1982.

Respectfully yours,

JEANNETTE JOHNSON, CLERK
COURT OF APPEALS, FIFTH
SUPREME JUDICIAL DISTRICT
OF TEXAS, DALLAS, TEXAS

By Myra Sands, Deputy

cc: (2 copies) CLERK, COURT OF CRIMINAL APPEALS, AUSTIN, TEXAS, 78711.

cc: W. T. Westmoreland, Jr.
Assistant District Attorney
Dallas County, Texas

Office-Supreme Court, U.S.
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NATHAN MAURICE SHAY,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S MEMORANDUM OPPOSING CERTIORARI

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

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ATTORNEYS FOR RESPONDENT

NO. 82-808

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NATHAN MAURICE SHAY,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S MEMORANDUM OPPOSING CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Mark White, Attorney General of Texas, attorney for Respondent, and submits this his Memorandum Opposing Certiorari:

I.

The sole question presented by Petitioner is whether his judgment of conviction of forgery should be reversed because the evidence at his trial was insufficient to establish his knowledge that the American Airlines coupons he bought were forged or that he sold them

with intent to defraud. This question is a plainly insubstantial one that does not merit plenary review by this Court.

II.

In its opinion affirming the judgment of conviction, the Fifth Supreme Judicial District of Texas noted that the prosecution "may establish intent to defraud or harm circumstantially by proof of the accused's knowledge that the instrument was forged." (Exhibit A to the Petition for Writ of Certiorari at 2). The court further noted that George Kent, who bought the forged airline coupons from Petitioner, testified at trial "that at the time of the transaction, Appellant insisted on cash, refused to give Kent his telephone number, which was unlisted, and gave Kent a false name." (*Id.*). Citing state law authority, the court concluded:

> We find these circumstances sufficient, taken as a whole, for the jury to find that appellant knew that the coupons in question were forged and, therefore, acted with intent to defraud.

(Id.). Petitioner's argument amounts to a complaint that a rational trier of fact could not reasonably have drawn such inferences from the circumstances. (Petition at 9-11).

III.

Plainly Petitioner fails to present a substantial federal question. He argues that the outcome of his case should have been different under *Jackson v. Virginia*, 443 U.S. 307 (1979), but advocates no alteration of the standard of review set forth in *Jackson v. Virginia*. Instead, he complains of its routine and unexceptional application in his case. He sets forth no conflicting case from any jurisdiction. Accordingly, there are no "special and im-

portant reasons" for granting review in his case. S.Ct.R. 17.

Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY III
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ATTORNEYS FOR RESPONDENT

December _____, 1982

PROOF OF SERVICE

I, Douglas M. Becker, Assistant Attorney General of Texas, do hereby certify that on the _____ day of December, 1982, three copies of the Memorandum Opposing Certiorari were mailed, postage prepaid, to Kerry P. Fitzgerald, 3503 Fairmount, Dallas, Texas 75219. All parties required to be served have been served. I am a member of the Bar of this Court.

DOUGLAS M. BECKER
Assistant Attorney General
Attorney for Respondent

SUBSCRIBED AND SWORN to before me this _____ day of _____, 1982.

NOTARY PUBLIC in and for
Travis County, Texas